Law Enforcement Digest

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HONOR ROLL

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President: James D. Ward - Mason County Sheriff's Office
Best Overall: Eric C. Werner - Seattle Police Department
Best Academic: Eric C. Werner - Seattle Police Department
Best Firearms: Charles E. Fuller - Monroe Police Department
Tac Officer: Sergeant David Woods - Fife Police Department

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UNITED STATES SUPREME COURT

SIXTH AMENDMENT RIGHT TO COUNSEL -- INCLUDING ITS POST-ARRAIGNMENT, "INITIATION-OF-CONTACT" BAR -- DOES NOT EXTEND TO OTHER CRIMES, EVEN TO CLOSELY RELATED CRIMES

Texas v. Cobb, 121 S.Ct. 1335 (2001)

Facts and proceedings below:

While under arrest for an unrelated offense, Cobb confessed to a home burglary that he committed about six months earlier. But he denied knowledge of a woman and child's disappearance from the home at about the time of the burglary. He was indicted for the burglary, and the court appointed an attorney to represent him on the burglary charge.

Cobb later confessed to his father that he had killed the woman and child when the woman confronted him during the burglary. He said he had buried the bodies in a nearby wooded area. Cobb's father contacted the police. At that point, almost two years had passed since the burglary and the contemporaneous disappearance of the woman and child. Officers then obtained an arrest warrant for Cobb on the murder, and they picked Cobb up. Cobb waived his rights under Miranda, confessed to the murders, and led police to the place where he had buried the bodies. Cobb was charged and convicted of capital murder and was sentenced to death.

Cobb appealed to the Texas Court of Criminal Appeals. He argued that his confession should have been suppressed because it was obtained in violation of his 6th Amendment right to counsel. He asserted that his counsel-right as to the related murder attached and was invoked when counsel was appointed in the burglary case. The Texas high court reversed Cobb's conviction, holding that once the 6th Amendment right to counsel attaches and is invoked as to the offense charged, it also attaches and is invoked as to any other offense that is closely related factually to the offense charged.

ISSUE AND RULING: Once the 6th Amendment right to counsel attaches to a particular charged offense, does that right also attach to any other offense that is closely related factually to the offense charged? (ANSWER: No; therefore, when Cobb invoked his already-attached 6th Amendment right on the burglary charge, he did not also invoke his not-yet-attached 6th Amendment right on the as-yet-uncharged murders)

Result: Reversal of Texas Court of Criminal Appeals decision and reinstatement of Texas trial court's capital conviction of Raymond Levi Cobb.

ANALYSIS:

[INTRODUCTORY LED EDITORIAL NOTE: In Michigan v. Jackson, 475 U.S. 625 (1986), 475 U.S. 625 (1986) May 1986 LED:04, the U.S. Supreme Court ruled that a defendant's first court appearance on a

filed charge where he is assigned counsel or he acknowledges that he has retained counsel constitutes an invocation of his 6th Amendment right to counsel, and, after that point, officers may not initiate contact with the defendant on the charged crime. The lead opinion in Cobb (strangely, we think) does not mention the Jackson decision. The concurring opinion signed by three of the five majority justices, while otherwise in agreement with the lead opinion, argues that Jackson should be overruled. The four justices in dissent in Cobb argue that Jackson was a wise decision, and they argue in vain that the Jackson rule should be extended to defendant Cobb's circumstance. Washington officers should assume that Jackson remains good law, though limited by Cobb's "same offense" rule.]

In McNeil v. Wisconsin, 501 U.S. 171 (1991) **Sept. 1991 LED:10**, the U.S. Supreme Court held that, despite the attachment and invocation of a defendant's 6th Amendment right to counsel on a charged offense, officers can initiate contact with the defendant as to uncharged matters. That is because the 5th Amendment cannot be invoked except during a custodial interrogation, and the 6th Amendment protection is charge-specific. Although some lower courts have read into McNeil's offense-specific, 6th Amendment rule an exception for crimes that are "factually related" to a charged offense, and have interpreted other U.S. Supreme Court precedents to support that approach, those lower courts are in error, the Cobb majority says.

The Cobb majority justices take issue with the defendant's prediction of dire consequences if the Court does not extend the "offense-specific" 6th Amendment rule to cover "closely related" matters. Defendant Cobb argued that, if the Court does not stretch the "offense-specific" 6th Amendment rule in this manner, then this leaves only the 5th Amendment rules to protect against police interrogation contacts on uncharged crimes. He argued that this will somehow prove disastrous to charged suspects' constitutional rights, permitting the police almost total license to conduct unwanted and uncounseled interrogations. The Cobb majority justices reject defendant Cobb's "parade of horribles" criticism of its 6th Amendment rule, asserting that his view fails to appreciate two critical considerations.

The first consideration is that, under Miranda, a suspect must be advised of and knowingly waive his 5th Amendment rights -- (a) against compulsory self-incrimination (also known as the right to silence) and (b) to consult with an attorney -- before authorities may conduct custodial interrogation. Here, the officers scrupulously followed Miranda's dictates before questioning Cobb.

The second consideration is that the Constitution does not require that the Court completely ignore society's interest in the need for law enforcement officers to be able to talk to witnesses and suspects, including those who have been charged with other offenses. The Cobb lead opinion thus notes McNeil Court's explanation:

> Since the ready ability to obtain uncoerced confessions is not an evil but an unmitigated good, society would be the loser. Admissions of guilt resulting from valid Miranda waivers are more than merely desirable; they are essential to society's compelling interest in finding, convicting, and punishing those who violate the law.

Next, the Cobb lead opinion explains that, although the 6th Amendment right to counsel clearly attaches only to charged offenses, the Court has recognized in other contexts that the definition of an "offense" is not necessarily limited to the four corners of a charging document. The test to determine whether there are two different offenses or only one is whether each provision requires proof of a fact which the other does not, as the U.S. Supreme Court first announced in Blockburger v. United States, 284 U.S. 299 (1932), a case addressing the 5th Amendment protection against double jeopardy.

The Blockburger test has long been applied to set the scope of the 5th Amendment's Double Jeopardy Clause, which prevents multiple or successive prosecutions for the "same offense." There is no constitutional difference between the meaning of "offense" in the 5th Amendment double jeopardy context and in the 6th Amendment right-to-counsel context, the Cobb lead opinion declares. Accordingly, when the 6th Amendment right to counsel attaches, that right encompasses offenses that, even if not formally charged, would be considered the same offense under the Blockburger test. But the right to counsel does not extend beyond that scope to include closely related offenses which do not come within the "same offense" test.

As the final step in its analysis, the lead opinion applies the Blockburger "same offense" test to Cobb's case. At the time Cobb confessed to the murders, he had been indicted for burglary, but he had not been charged

in the murders. As defined by law, murder and burglary have different elements. Therefore, burglary and murder are not the "same offense" under Blockburger. Thus, the 6th Amendment right to counsel did not bar police from interrogating Cobb regarding the murders, and his confession was admissible.

LED EDITORIAL NOTE: We have incorporated the Cobb decision into our article—"Initiation of contact rules under 5th and 6th amendments" – which is accessible on the CJTC LED webpage via a link on the CJTC Internet Home Page at [http://www.wa.gov/cjt/]. Go to the Home Page, click on LED, and scroll down to article.

LED EDITORIAL COMMENTS:

1. The Cobb rule's "same offense" test is not very inclusive of other matters. There is a fair amount of case law under the "same offense" test of Blockburger. Not all of that case law (previously applying only to double jeopardy questions, now applying to right to counsel questions too) is consistent. But we think that we can say as a general proposition that the test is not very broad or inclusive of other matters. As the Cobb majority ruled, two crimes with different elements are, by definition, not the same offense. Nor are multiple separate violations of the same statute such as conducting separate marijuana grow operations at the same time but at different locations. Nor are separate violations of the same statute involving different victims.

2. The Cobb rule applies to Washington officers. To date, the Washington courts have not made "independent grounds" constitutional readings of the "right to counsel" provisions of our Washington constitution. And the Washington Court Rules on "right to counsel" (CrR 3.1 and CrRLJ 3.1), which in a few circumstances impose special restrictions on Washington officers (i.e., duty to give counsel-right warning immediately following arrest even if no interrogation to follow and duty to provide phone access to attorney on request), do not appear to impact the Cobb rule. But we will have to watch and wait. No doubt the criminal defense bar and some others will take great umbrage at the reasonable, pro-state decision in Cobb, so we anticipate pressure on our Washington courts to find a way around Cobb.

3. Prosecutor must consider ethical restrictions on contacts with represented persons. It is often difficult for prosecutors to provide individual case advice regarding the question posed in the Cobb case, because prosecutors are subject to general ethical obligations against "ex parte contacts" (i.e., where defense counsel not present) with parties represented by legal counsel. The ethical restrictions against ex parte contacts with represented persons apply to both civil and criminal matters. The *constitutional* restrictions on police initiation of contact with represented persons are not as broad as are the *ethical* restrictions on prosecutors. Police are not bound by the ethical restrictions on prosecutors, but a prosecutor will run afoul of the Bar Association if the prosecutor encourages an officer's contact with a represented person in relation to a pending matter. City and county law enforcement agencies in Washington may want to seek advance *general* advice from their prosecutors to guide police actions in the Cobb context in future cases.

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BRIEF NOTE FROM THE UNITED STATES SUPREME COURT

SOUTH CAROLINA PUBLIC HOSPITAL'S DRUG-TESTING POLICY FOR PREGNANT WOMEN FAILS FOURTH AMENDMENT BECAUSE CRIME CONTROL WAS GOAL OF GOVERNMENTAL POLICY -- In Ferguson v. City of Charleston, S.C., 121 S.Ct. 1281 (2001), in a 6-3 Fourth Amendment decision, the U.S. Supreme Court declares unconstitutional a South Carolina state hospital's program, created and administered in cooperation with the local police, of testing pregnant women for drug use and turning the results over to law enforcement for criminal justice purposes, without the women's consent.

The majority opinion distinguishes three prior U.S. Supreme Court decisions using a "special needs" rationale to uphold drug testing of: 1) railroad employees involved in train accidents, 2) Customs Service employees in certain circumstances, and 3) high school students participating in interscholastic sports. The South Carolina public hospital's policy served a primarily law enforcement purpose; and therefore the policy

did not qualify for exception from Fourth Amendment probable cause and warrant requirements, as did the programs in the prior three cases, the Ferguson Court holds.

Result: Reversal of Federal Court of Appeals and District Court decisions upholding the drug-testing policy; remand of case to lower court, presumably for grant of injunctive relief requiring termination of the hospital's practice of sharing drug-testing results with police.

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BRIEF NOTE FROM THE NINTH CIRCUIT, U.S. COURT OF APPEALS

NO QUALIFIED CIVIL IMMUNITY FOR SHOOTING EMOTIONALLY DISTURBED MAN WITH LESS-THAN-LETHAL BEANBAG ROUND WHERE NO CLEAR WARNING GIVEN -- In Deorle v. Rutherford, 242 F.3d 1119 (9th Cir. 2001), the 9th Circuit of the U.S. Court of Appeals rules, 2-1, that an officer who shot a distraught, disoriented and emotionally disturbed suspect with a lead-filled beanbag round was not entitled to qualified immunity from the suspect's section 1983 civil rights claim for use of excessive force.

The majority opinion notes that the suspect was known to be unarmed and was walking toward the officer at a normal gait at the time of the shooting. Although the officer shouted "less lethal" before firing the round, the officer did not, before shooting, give the suspect a clear warning, nor did the officer demand that the suspect stop his approach. Unfortunately for all involved, the beanbag round ended up impacted in the suspect's eye socket, and the suspect suffered multiple fractures to his cranium, loss of his left eye, and embedded lead shot in his skull.

Under these facts, among others, the majority judges conclude, the degree of force was unreasonable under the Fourth Amendment. The officer failed to act reasonably and in accordance with clearly established law, the majority concludes, in shooting the suspect with the beanbag round under these facts without first giving him a clear warning that this force was about to be applied. While beanbag rounds are not deadly force, their use is a significant application of force designed to render a person incapable of resistance. Under the circumstances, the majority asserts, the officer could not reasonably have believed the shooting constituted reasonable force.

The dissenting judge argues that the majority overlooks the various weapons within reach of the suspect, grossly misjudges the risk to the officer, and fails to recognize that the beanbag round had been aimed at the suspect's abdomen. The dissenting judge also questions the majority's view that the law requires a warning before application of certain types of non-lethal force.

Result: Reversal of U.S. District Court (E. D. California) decision granting summary for defendants; remand of case for trial on the excessive force civil rights suit.

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BRIEF NOTE FROM THE WASHINGTON STATE SUPREME COURT

(-) MONTANA LAW AUTOMATICALLY RESTORING GUN RIGHTS IN MONTANA DID NOT RESTORE FELON'S WASHINGTON GUN RIGHTS, BUT "EARLY DISCHARGE" CERTIFICATE CONSTITUTED PROCEDURE FINDING "REHABILITATION" PER RCW 9.41.040(3) -- In State v. Radan, ___Wn.2d ___, 21 P.3d 255 (2001), the Washington Supreme Court rules, 5-4: (A) that, while a discharge following a Montana felony conviction automatically restores the felon's firearms rights in Montana, such discharge does not automatically restore the Montana felon's firearms rights under Washington law; but (B) that an "early" discharge issued by the Montana Department of Corrections under the facts of this particular case qualified as a "certificate of rehabilitation" or its equivalent, thus restoring the Montana felon's rights under Washington law, RCW 9.41.040(4).

In 1987 Radan was convicted of first degree theft in Montana. In 1994, Montana's DOC gave him an "early discharge" from parole supervision. In 1997 Radan was found in possession of firearms in Pend Oreille County, Washington. He was charged under RCW 9.41.040, but the superior court dismissed the charges on grounds that Radan's Washington gun rights had been restored in 1994. The prosecutor won a reversal

from the Court of Appeals (see **March 2000 LED:13**), and Radan obtained review in the Washington Supreme Court, which has now reinstated the trial court's dismissal of the charges.

RCW 9.41.040 bars possession of firearms by persons in Washington with convictions in this or other states for felonies and for certain specified non-felony crimes committed against family or household members after July 1, 1993. RCW 9.41.040(3) provides an exception to the conviction-bar if the conviction "has been the subject of *a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person* or the conviction or disposition has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence." (Emphasis added)

The Radan majority rejects defendant's first argument that he should get the benefit of Montana law, which automatically restores gun rights to felons upon completion of their period of parole supervision. Unlike **federal** gun law, which completely defers to the laws of the respective 50 states to determine when and how gun rights are restored following a state court conviction, Washington law does not defer to the laws of the other states. Accordingly, the majority holds, Radan's Washington gun rights were not restored automatically upon his completion of his period of parole supervision on the Montana conviction.

But, under the following analysis, the majority justices rule that, when Montana's DOC issued an "early discharge" to Radan, that act restored his Washington gun rights under RCW 9.41.040(3). The Radan majority explains why it sees the "early discharge" as constituting a procedure finding that Radan had been "rehabilitated" for purposes of subsection (3):

> Radan's final contention is that this Court should look beyond the automatic restoration of rights conferred by Montana law and look to the specific facts related to his "early" discharge from supervision. Radan was granted early discharge based upon Montana Criminal Code § 46-23-1011, which states: "(6)(a) Upon recommendation of the probation and parole officer, a judge may conditionally discharge a probationer from supervision before expiration of the probationer's sentence if: (i) the court determines that a conditional discharge from supervision: (A) is in the best interests of the probationer and society; and (B) will not present unreasonable risk of danger to the victim of the offense[.]"
>
> Radan contends that the statutory considerations are equivalent to a finding of rehabilitation. The Court of Appeals disagreed, concluding without the benefit of authority that "the exemption applies only when it is established that the procedure included a fact-finding inquiry resulting in a finding of the rehabilitation or innocence of the felon . . . ." We disagree. Even though RCW 9.41.040 unambiguously requires a "finding of rehabilitation" this phrase is undefined. Additionally, the Legislature's use of the phrase "other equivalent procedure" suggests the Legislature intended some deference to the practices of other jurisdictions, as long as the practice involved a finding of rehabilitation.
>
> The letter from the Montana Department of Corrections recommending Radan's early discharge indicates that the recommendation was based in part on the following facts: (1) Radan had no new arrests; (2) he had paid his restitution; and (3) he did not wish to return to Montana. However, more important is the fact that the statute authorizing Radan's early discharge requires a finding that a conditional discharge from supervision is in the best interests of the probationer and society and "will not present unreasonable risk of danger to the victim of the offense." Mont. Crim. Code § 46-23-1011.
>
> While we decline to establish a precise definition for the phrase "finding of rehabilitation" we believe that for purposes of RCW 9.41.040 the finding in Radan's case is equivalent to an "other equivalent procedure" based upon a "finding of rehabilitation." See United States v. Pagan, 721 F.2d 24, 30 (2d Cir. 1983) ("certificate setting aside a youthful offender's conviction and unconditionally discharging him from further probation prior to expiration of the maximum term of probation clearly implies a finding that no further supervision is required, i.e., that this offender has been rehabilitated").

The dissenting justices argue in vain that in accepting Radan's argument the majority has stretched the

"finding of … rehabilitation" language of RCW 9.41.040(3) too far.

Result: Reversal of Court of Appeals decision and reinstatement of dismissal order by Pend Oreille County Superior Court.

LED EDITORIAL COMMENTS:

(1) When can Washington courts restore gun rights?

In a footnote, the Radan majority says, in effect, that, so long as he did not have any intervening convictions, Radan could have had his Washington gun rights restored simply by waiting five years following his discharge on the Montana conviction, and then filing a petition in a Washington court. See RCW 9.41.040(4)(b). In the majority's view, a person who passes the waiting periods under (4)(b) with a clean record need not also obtain a "certificate of rehabilitation" in order to get his Washington gun rights restored. We wonder if that is what the Legislature had in mind, and we would note that the footnote is "dicta" (i.e., discussion not necessary to support the Court's decision). Nonetheless, we would guess that the issue will now generally be considered to be resolved based on the Radan majority's footnote.

We wonder too about the possibility of restoration of Washington gun rights for a person who does not want to wait out the periods under RCW 9.41.040, or for a person who does not otherwise qualify under subsection (4)(b). Do Washington courts even have authority to issue certificates of rehabilitation? Some hold the view that Washington courts lack such power, pointing to an unpublished (and therefore non-precedential) March 13, 1995 Ninth Circuit Court of Appeals decision to that effect in U.S. v. Allen, 1995 U.S. App. LEXUS 5437. On the other hand, we believe that a number of courts have issued certificates of rehabilitation in the past decade, with the specific purpose of restoring gun rights, and we assume that those court orders are being honored.

Perhaps we are being unrealistic, but we strongly feel that the restoration provisions of the firearms statute, among other provisions in chapter 9.41 RCW, are in need of clarifying amendment. We are compiling a wish list.

(2) What about RCW 9.41.070(3)?

Not addressed at all in Radan is RCW 9.41.070. That section, which primarily addresses issuance of concealed pistol licenses, contains a stand-alone provision in subsection (3) which provides in relevant part that "[a]ny person whose firearms rights have been restricted and … who is exempt under 18 U.S.C. Sec. 921(a)(20)(A) shall have his or her right to acquire, receive, transfer, ship, transport, carry, and possess firearms in accordance with Washington state law restored except as otherwise provided in this chapter." While we believe that this subsection does not affect the Washington gun rights of persons with Washington convictions, we think that it may have supported Radan's argument for deferring to Montana's statute on automatic restoration of rights.

18 U.S.C. Sec. 921(a)(20) is the federal statute mandating that federal law on gun rights defer to the restoration-of-rights laws of the respective 50 states. But 18 U.S.C Sec. 921(a)(20)(A) refers only to restoration of rights on certain business-related crimes. We think it is likely that the statute's narrowing reference in RCW 9.41.070(3) to subsection (A) of the federal law was inadvertent. But Division Two of the Court of Appeals has declared in that RCW 9.41.070(3)'s reference to the federal law on restoration of rights should be read narrowly as applying only to the business crimes encompassed under subsection (A). See Forster v. Pierce County, 99 Wn. App. 168, 176 (Div. II, 2000) March 2000 LED:13. We don't think that Division Two's dicta in Forster is the last word on the meaning of subsection (3)'s reference to the federal law. Clarification of this statutory provision is another item on our wish list for legislative cleanup.

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HOLDING A PERSON'S ID WHILE CONDUCTING A WARRANTS CHECK HELD TO BE "SEIZURE"

State v. Crane, ___ Wn. App. ___, 19 P.3d 1100 (Div. II, 2001)

Facts and proceedings below:

A police officer was monitoring a house for which other officers were obtaining a search warrant. The officer contacted a Shawn Crane as Crane was approaching the house. The officer asked Crane for ID. Crane complied. While the officer held the ID in Crane's presence, the officer used his hand-held radio to run a warrants check. The check took just a few minutes. When a warrant "hit" came back, the officer arrested Crane. Crane then tried to toss some cocaine, but the officer seized the cocaine.

The prosecutor charged Crane with unlawful possession of the cocaine. After denying Crane's motion to suppress the cocaine, the trial court convicted Crane of the charges.

ISSUES AND RULINGS: 1) Was Crane "seized" when the officer ran a warrant check in Crane's presence while conducting a warrants check? (ANSWER: Yes) 2) Did the officer have justification for the seizure? (ANSWER: No)

Result: Reversal of Grays Harbor Superior Court conviction of Shawn O. Crane for possession of cocaine.

ANALYSIS: (Excerpted from Court of Appeals opinion)

1) Seizure

> It is well established that if an officer retains the suspect's identification while conducting a warrants check away from the suspect, there has been a seizure within the meaning of the Fourth Amendment. Courts have also found a seizure where the officer told the suspect to wait or stay in a specific place while the officer ran a warrants check. But merely examining and not retaining a suspect's identification is not a seizure. State v. Hansen, 99 Wn. App. 575 (2000) **June 2000 LED:17** (holding that a seizure did not result when the officer handed the identification to a second officer who recorded the suspect's name and birth date and returned the license to the suspect before conducting a warrants check).
>
> **This case falls between the situation above where the officer walks away with the identification and runs a warrants check and the situation in Hansen, where the officer merely records information from the identification and returns it. We see no relevant distinction between this case and the former. In fact, a detainee might well feel more intimidated and less free to leave when the officer is close at hand.**
>
> Here, although [the officer] did not specifically tell Crane that he was not free to leave or that he must wait during the warrants check, the circumstances would cause a reasonable person to conclude that he was not free to leave or to terminate contact until the officer completed the warrants check and found the detainee had a clear record. This was not a casual contact on a public street. [The officer] had parked his patrol car behind the car Crane arrived in, requested Crane's identification, and retained it while running a warrants check. Crane was also aware he had entered an area the police had secured. Thus, we conclude that [the officer] seized Crane at the latest when [the officer] held Crane's identification and ran the warrants check.

2) Justification for seizure

> Crane next argues that there was no justification to seize him at that time. He contends that his entering an area that the police had under surveillance while they awaited a search warrant did not justify the seizure. The State responds that these facts justified the seizure

because [the officer] had a duty to maintain the status quo until the search warrant was issued.

An investigatory stop may be made on less than probable cause. "An officer making such an investigatory stop, however, is required by the Fourth Amendment to have a reasonable suspicion, based on objective facts, that the individual is involved in criminal conduct" or is a safety threat.

Neither close proximity to others suspected of criminal activities nor presence in a high crime area, without more, will justify a seizure.

Here, Crane complied with all of [the officer]'s requests. He stopped when told to, produced identification when requested, and offered what appeared to be a legitimate reason for approaching the house. The State does not propose any reason to suspect that Crane was not being truthful, that Crane's identification card was false, that Crane posed or appeared to pose any threat to [the officer], or that Crane behaved suspiciously in any way until after he was arrested. [The officer] was checking identification solely because he was told to do so by his sergeant, not because Crane had behaved suspiciously or posed any type of threat. [The officer] could have secured the residence simply by telling Crane to leave.

Because [the officer] had no reasonable articulable suspicion that Crane had committed or was about to commit a crime or that Crane was a threat to anyone's safety, the seizure violated Crane's Fourth Amendment rights.

[Some citations omitted]

COURT REJECTS SAFETY-FRISK RATIONALE FOR SEARCH, BUT UPHOLDS POST-ARREST SEARCH OF NEARBY CAR AS A SEARCH "INCIDENT TO ARREST"

State v. Bradley, ___ Wn. App. ___, 18 P.3d 602 (Div. I, 2001)

Facts and proceedings below: (Excerpted from Court of Appeals opinion)

At about 11:30 p.m. on November 1, 1998, Seattle Police Officers [1], [2], and [3] heard six gunshots fired in rapid succession coming from one or two blocks north of their location near Pike Street. Based on their training and experience, the officers determined that all six shots were fired from a single, medium-range caliber firearm. After hearing the shots, the officers jumped into their unmarked police car and drove northbound. They saw a black male wearing a brownish shirt and dark pants running towards them. They lost sight of the man for a few seconds when he turned into a parking lot.

When the officers turned their vehicle into the parking lot, they saw the same man standing at a blue, older model Cadillac. Although he was standing outside of the Cadillac, he was leaning down over the front seat. According to Officer [3], it looked like he was laying down on the seat and was just rising up. As the officers approached, the man stood up, looked at the police car and tried to close the driver's side door as he walked away, but left the door somewhat ajar. With their weapons drawn, the officers (wearing plain clothes) identified themselves as the police and commanded the man to stop, show his hands and get down on the ground. He stopped 10 to 12 feet from the Cadillac, but did not lie on the wet ground. When he did not fully comply, two of the officers took physical control of him and brought him to the ground without resistance. They handcuffed him and then frisked for weapons, but found none. While holstering their weapons, they identified the man as Ray Bradley and asked him what happened and why he was running.

Once handcuffed, Bradley told the officers that a Crips gang member had shot at him, describing the person as wearing a blue beanie hat, a dark coat and light colored pants.

Upon hearing this description, the officers relayed it over the police radio. A police officer at a different location, however, radioed information obtained from a witness who said that the person who fired the shots near the 200 block of Pine Street was a black male wearing a tan colored shirt and dark pants. Despite the fact that this description fit Bradley, Officer [2] walked up the alley to locate an individual with a gun. When he turned the corner onto the sidewalk on Pine Street, he found six .380-caliber shell casings. After placing the casings in bags, Officer [2] returned to the parking lot and found Officers [1] and [3] questioning Bradley. Bradley told [1] that he had left a nearby bar when 20 kids shot at him. He ran around the corner in fear for his life, he said. According to Bradley, when he arrived at his car he remembered that he forgot his jacket at the bar and turned back to get it when the police arrived.

At some point before Officer [2] returned to the parking lot, Officer [1] had conducted a search of Bradley's car. (The details of Officer [1]'s search are uncertain because he was unavailable for trial.) When Officer [2] returned and told the others about the shell casings, he proceeded to search Bradley's vehicle also. He looked under the seat, in the crack of the seat, above the visor, in the back of the vehicle and then went around the car to look at the passenger's side. As [2] searched, Officer [3] followed him, searching in more detail and continuing the search after [2] left to check on damage to surrounding buildings. Meanwhile, Officer [1] remained with Bradley the entire time. Between some loose carpeting and the firewall near the dashboard and the front passenger seat, Officer [3] found a semi-automatic handgun. About thirty minutes had passed between the time the officers first contacted Bradley and actually finding the gun. Officer [3] then advised Bradley of his rights while Bradley sat detained in a police van. In a more intensive search of Bradley himself, the officers found a quantity of illegal narcotics.

At the suppression hearing, Officer [3] testified that although he was not certain of the exact timing, the information they received over the radio giving the description matching Bradley came shortly after making contact with him. Upon cross-examination, he also acknowledged that once they had Bradley on the ground and handcuffed, there was no threat to officer safety:

Q. At the point that Mr. Bradley is down on the ground and is handcuffed and you have determined that he is not armed with any kind of a weapon, you're satisfied you've got the situation relatively under control at that point; [sic] don't you?
A. Yes, from my little area of responsibility there, yes, I felt that it was under control. . . .
Q. [T]here was no danger at that point of Mr. Bradley getting to that vehicle in some kind of uncontrolled fashion and reaching that gun? A. That's a fair statement.
Q. You weren't concerned about officer safety then in terms of if there was a gun or a knife or some dangerous weapon in that vehicle, at that point you were no longer concerned that someone could get to that vehicle and get it and use it against you?
A. That's a fair statement, yes.

Officer [2] testified that Bradley was not under arrest at the time they searched the car. In his testimony, Officer [3] concurred and stated that they did not have probable cause to arrest Bradley at the time of the search. At the suppression hearing, Officer [3] said they obtained Bradley's consent to search his vehicle. According to Officer [3], if Bradley had not consented to the search, they would have let him leave with his car and the gun later found inside. Following the hearing, the trial court concluded that the search was not done with consent nor incident to arrest but rather was a protective search: "[T]he search was a valid protective search for weapons on well-grounded, reasonably articulable suspicions that a gun was in the defendant's car." Thereafter, the trial court found Bradley guilty of unlawful possession of a firearm in the second degree and unlawful possession of cocaine based on stipulated facts.

ISSUES AND RULINGS: (1) Was the search of Bradley's car justifiable as an officer-safety vehicle "frisk"? (ANSWER: No, because Bradley was completely under police control away from the vehicle at the time of the search); 2) Was the search of Bradley's car justifiable as a search "incident to arrest", although the officers did not recognize this point of law when they made the search? (ANSWER: Yes; the officers collectively had probable cause to arrest Bradley when they made the search, the search was therefore objectively reasonable, even if they did not subjectively know that)

Result: Affirmance of King County Superior Court conviction of Ray J. Bradley for unlawful possession of a firearm in the second degree and for unlawful possession of cocaine.

ANALYSIS: (Excerpted from Court of Appeals opinion)

1) Car "Frisk" For Officer Safety

Bradley challenges the warrantless search of his vehicle as beyond the scope of a Terry stop (an investigatory stop). Under the Washington Constitution, a valid Terry stop may include a search of the suspect's vehicle when the search is necessary to assure officer safety. A search for weapons may extend only to areas within the investigatee's immediate control. The scope of the search may expand to areas of the vehicle's interior where another person remains seated inside the car or where the investigatee has made a furtive gesture as if to hide a weapon.

Minutes after hearing gunshots, the police officers here observed Bradley run down an alley, lean into a vehicle and then walk away. When Bradley did not respond cooperatively to the officers' commands to stop, the officers forced him to the ground and then handcuffed and frisked him. Officer [3] detained Bradley inside a police van while Officer [2] investigated and secured the surrounding area. At the same time, Officer [1] searched Bradley's car. Upon cross-examination at trial, Officer [3] acknowledged that at that point there was no longer any danger of Bradley obtaining a weapon from the vehicle. Unlike the traffic stop in State v. Larson, 88 Wn. App. 849 (Div. I, 1997) **Feb 98 LED:05** the facts here did not require Bradley to later reenter the vehicle to obtain his vehicle registration. [***LED EDITORIAL NOTE*: *This is a closer question, we think, than the Bradley Court recognizes; the fact that the suspect might be allowed to return to his vehicle should no arrest result from the Terry stop might justify checking his car for a gun under the dangerous circumstances of this case. See Michigan v. Long, 463 U.S. 1062 (1983). Safety first. – LED Ed.]*** Despite similar furtive movements, [State v. Kennedy, 107 Wn.2d 1986 **Dec 86 LED:01**] and [State v. Watkins, 76 Wn. App. 726 (Div. I, 1995) **April 95 LED:02**] are also distinguishable because the defendants in those cases had companions who remained in the vehicle and could have accessed a weapon. Because the officers' safety was no longer in danger, we conclude that a search of Bradley's vehicle was beyond the scope of an investigatory stop.

2) Car Search "Incident To Arrest"

In making an arrest, officers may search the passenger compartment of a vehicle for weapons or destructible evidence if the vehicle was in the immediate control of the suspect at the time of-or just prior to-an arrest. State v. Stroud, 106 Wn.2d 144, 152, 720 P.2d 436 (1986) (defendants were beside vehicle). But compare State v. Porter, 102 Wn. App. 327, 334, 6 P.3d 1245 (2000) **Nov. 2000 LED:05** (defendant was not in immediate control of vehicle after walking 300 feet away **[*and therefore that search was not "incident to" the arrest of Porter 300 feet away. LED Ed. Note*]**). Stroud explicitly allows a search of an automobile incident to arrest after the suspect is handcuffed and in the patrol car. There are limitations on such warrantless searches: (1) officers may not open a locked container or locked glove compartment; (2) the search must be contemporaneous with arrest; and (3) the suspect must remain at the scene.

> Nonetheless, a search incident to arrest is valid if there is probable cause to arrest a suspect for the relevant offense at the time of the search, even if the officer does not subjectively consider the suspect formally under arrest but merely detained. Probable cause exists where the facts and circumstances known to the arresting officer are sufficiently trustworthy to cause a reasonable person to believe that an offense has been committed. Because a determination of probable cause is an objective inquiry, we may consider the cumulative information possessed by all officers in a joint investigation.
>
> Here, the officers heard several gunshots coming from the area where they found Bradley. When they drove down the alley, they saw him running towards them and then turn into a parking lot. Upon arriving in the parking lot, the officers witnessed Bradley make furtive movements in his car and then turn and walk away when he saw them. He told them that a Crips gang member wearing a blue beanie hat, dark coat and light-colored pants had shot at him. Then he made the suspicious statement that he was going back to get his coat. The officers received witness information over their radio that described the suspect as a black male wearing a tan colored shirt and dark pants near the 200 block of Pine Street. This description fit Bradley perfectly. Moreover, Officer [2] found six shell casings for a .380 firearm at the north end of the alley where they first saw Bradley running. Based on these cumulative facts, we conclude that the officers had probable cause to believe that Bradley unlawfully fired a gun. We hold that the search of the vehicle was a valid search incident to arrest and that the trial court properly denied Bradley's motion to suppress the gun found in the car.

[Footnotes and some citations omitted]

SEARCH WARRANT AFFIDAVIT FAILS TO ESTABLISH PC THAT MISDEMEANANT WANTED ON ARREST WARRANT WOULD BE INSIDE THIRD PARTY PREMISES TARGETED BY SEARCH WARRANT

State v. Anderson (Rob Joseph), ___ Wn. App. ___, 19 P.3d 1094 (Div. III, 2001)

Facts and proceedings below: (Excerpted from Court of Appeals opinion)

> [Officer 1] was patrolling the Finley area on May 23, 1999. He saw Brad Burgess riding a dirt bike near the home of Rob Anderson. He knew Mr. Burgess had a suspended driver's license. [Officer 1] suspected that methamphetamine was being manufactured at the Anderson house.
>
> [Officer 1] followed Mr. Burgess for some distance, then lost him. He returned to Mr. Anderson's place where he saw someone watering plants on one side of the house. He thought it might be Mr. Burgess. [Officer 1] approached the man, but immediately realized it was not Mr. Burgess. The man was Joshua Edwards. [Officer 1] asked Mr. Edwards for his identification. Mr. Edwards produced an ID card that listed a Kennewick address. [Officer 1] asked Mr. Edwards if he had any outstanding warrants. Mr. Edwards said he did not.
>
> [Officer 1] wrote down Mr. Edwards' name and telephone number then turned to check for outstanding warrants and talk to a woman who came to the door. The woman gave [Officer 1] permission to look for Mr. Burgess in an outbuilding on the property. The building was locked, and [Officer 1] could see nothing of interest by peering through a hole. Meanwhile, Mr. Edwards left. [Officer 1] guessed he had gone inside the house. But he did not see him do so.
>
> [Officer 1] returned to the station and ran further checks on Mr. Edwards. He learned that Mr. Edwards was part of a Benton County [jail] work crew. On May 26 (three days after meeting Mr. Edwards), [Officer 1] talked to [Officer 2] who supervised the work crew. [Officer

2] told him Mr. Edwards had missed one or two days of work crew. Jail records reflected the same Kennewick address and phone number displayed on Mr. Edwards' ID card. [Officer 2] told [Officer 1] he had left several messages for Mr. Edwards at the Kennewick number. But Mr. Edwards had not called back.

[Officer 2] obtained a warrant for Mr. Edwards' arrest for third degree escape, a misdemeanor. [Officer 1] then obtained a search warrant for both the Anderson property and the Kennewick address.

In his affidavit in support of the search warrant, [Officer 1] stated his belief that Mr. Edwards was "possibly" residing at the Anderson house. He also said that a warrant was out on Mr. Edwards for escape, that Mr. Edwards listed his address as Kennewick, and that [Officer 1] had seen him watering plants in the Anderson yard. The affidavit recites that Mr. Edwards "had gone in and out of the residence unhindered. It is unknown if Edwards, Joshua is living at either 402 W. 48th [Kennewick] or 203212 E. Hwy 937 [Anderson's]." The affidavit continues: "While contacting Edwards and running a warrants check, he ran from me before I had received a return, leading me to believe he was possibly wanted. Edwards also has numerous failures to appear for court, for the same charges, showing he has total disregard for the authority of the courts." A warrant was issued to search for Mr. Edwards at both places.

No attempt was made to contact Mr. Edwards or serve the warrant at his Kennewick address.

Later that same afternoon, nine officers in nine squad cars converged on the Anderson home with guns drawn. They split into two teams, one to the house and one to the outbuilding. One officer rapped at the locked door of the outbuilding and announced, "Sheriff's Department." [Officer 1] kicked in the door. Mr. Edwards was one of three adults inside. The officers entered with guns drawn and ordered everyone to hit the floor, face down. Several officers had semi- automatic rifles. [Officer 1] had briefed them before the raid to keep an eye open for methamphetamine paraphernalia. The other team took the house with drawn guns and ordered the people down.

The occupants of the outbuilding, including Mr. Edwards, were handcuffed and taken outside. [Officer 1] then recognized Mr. Edwards for the first time. [Officer 1] went back inside the shed to look around. He saw a propane tank with a blue coating on the nozzle, which he recognized as methamphetamine manufacturing equipment. A telephonic warrant was obtained to search further.

They found finished methamphetamine and ingredients. The State charged Rob Anderson with manufacturing methamphetamine. Mr. Anderson moved to suppress the evidence. The court denied his motion and convicted him on stipulated facts.

ISSUE AND RULING: Did the search warrant affidavit establish PC that Edwards (the subject of a misdemeanor arrest warrant) was a resident of or probably would be inside the target residence when it was searched? (ANSWER: No)

Result: Reversal of Benton County Superior Court conviction of Rob Joseph Anderson for manufacturing methamphetamine.

ANALYSIS: (Excerpted from Court of Appeals opinion)

Mr. Anderson complains that the supporting affidavit to search for Mr. Edwards only says he "possibly" lives at the Anderson residence. The State responds that the fact that [Officer 1] had seen Mr. Edwards watering plants at the Anderson residence just three days prior and coming and going unhindered establishes the required nexus between the person and the place to be searched.

Deliberate material misrepresentations in a warrant affidavit are stricken, and the validity of the warrant is determined from what remains. Innocent or negligent mistakes will not invalidate the warrant. The defense must make a preliminary showing of intentional lies or reckless disregard for the truth. If the affidavit without the misrepresentation does not establish probable cause, the motion to suppress should be granted. The fact that the affiant's information later turns out to be inaccurate or even false is of no consequence if the affiant had reason to believe those facts were true.

[Officer 1]'s affidavit includes two material misrepresentations. One, that Mr. Edwards had gone in and out of the dwelling unhindered, as if he lived there. Two, that Mr. Edwards ran away from [Officer 1]. The effect was to exaggerate the need for more than the usual procedures to locate a misdemeanor suspect. At the suppression hearing, [Officer 1] again asserted unequivocally that Mr. Edwards went inside the house. But on cross-examination he conceded that he was only guessing, and that he simply lost sight of Mr. Edwards. [Officer 1] did not testify that Mr. Edwards fled, but only that he wandered off. But Mr. Edwards had a right to wander off. This was a consensual encounter.

Also, the arrest warrant was recent. But [Officer 1] asserted in the affidavit that Mr. Edwards had failed numerous times to appear in court on the same charges. This falsely implied that the warrant was old.

Excised and supplemented, as Mr. Anderson suggests, the affidavit seeks authority of law to invade the home of a third party based on a fresh misdemeanor warrant, of which service has yet to be attempted at the suspect's own address, and the fact that the suspect was observed three days before watering flowers in the third party's yard. This is insufficient probable cause to support a search warrant for the home of a third party. The fact that Mr. Edwards was found on the premises when the warrant was served is not material, because it was not known to the judge when he issued the warrant.

[LED Editorial Note: As we explain in more detail in our "comments" below, the Anderson Court should have stopped here in its legal analysis. In the analysis that follows, Division Three mixes apples and oranges, and thus misreads the case law, in several of its statements as to limits on: 1) search warrants to execute misdemeanor arrest warrants, and 2) entry of a person's own residence to arrest on a misdemeanor arrest warrant.]

The officers already had the power to enter Mr. Edwards' own home to serve the arrest warrant. State v. Williams, 142 Wn.2d 17 (2000) (citing Steagald v. United States, 451 U.S. 204 (1981); Payton v. N.Y., 445 U.S. 573 (1980)). But there must be strong justification for forcefully entering even the suspect's own residence in the case of a minor offense - here a misdemeanor. State v. McKinney, 49 Wn. App. 850 (1987) **April LED:12** (citing State v. Chrisman, 100 Wn.2d 814 (1984)). When appropriate, the fugitive may even be given the opportunity to voluntarily surrender himself. Kain v. Nesbitt, 156 F.3d 669, 672 (6th Cir. 1998).

What the State was required to establish in this affidavit was justification to invade the home of parties not named in the warrant.

Washington Constitution Controls. We analyze police entry into private dwellings under our constitution article I, section 7, and apply different standards than the Fourth Amendment. Constitution article I, section 7, provides: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." Washington is guided by the sanctity-of-the-home analysis in Payton. The existence of a warrant to search the premises does not necessarily make a search lawful. See, e.g., State v. Richards, 136 Wn.2d 361 (1998) (knock and announce) **Nov 98 LED:03**.

> But even under the Fourth Amendment, the issuing magistrate must weigh the strength of the evidence favoring the proposed search against the individual's interest in protecting his own liberty and the privacy of his home. Steagald. The existence of an arrest warrant and the belief that the subject may be a guest in a third party's home is insufficient legal authority to enter the home. Steagald.
>
> The third party's privacy interest in being free from unreasonable invasion of his home is distinguishable from the suspect's interest in avoiding unreasonable seizure. Steagald. It is the rights of the homeowner that the issuing magistrate must balance with the necessity for the search. U.S. v. Prescott v. U.S., 581 U.S. 1343 (9th Cir. 1978). Unless the third party's interests are considered, the search is no more reasonable than if no warrant had been issued. Steagald. To allow an arrest warrant for a non-violent misdemeanor to create carte blanche for searching the homes of third parties creates the risk of the sort of abuse complained of here: Using the arrest warrant as a "pretext for entering a home in which the police have a suspicion, but not probable cause to believe, that illegal activity is taking place." Steagald. The reason for requiring a search warrant separate from the arrest warrant is to interpose a neutral magistrate between the police and unlawful pretextual searches. Steagald.
>
> When prevention fails, suppression is an appropriate redress.
>
> [Officer 1]'s affidavit was insufficient to establish probable cause to search Mr. Anderson's premises.

[Some citations omitted]

LED EDITORIAL C0MMENT: Space limits of the LED preclude a full explanation here of why we think that Division Three misstates the law as to limits on: 1) search warrants to execute misdemeanor arrest warrants, and 2) entry of a person's own residence to arrest on a misdemeanor arrest warrant. We believe that the Court mixed apples and oranges by failing to distinguish among cases and factual scenarios involving, respectively: a) warrantless entries to arrest; b) entries of third party residences based solely on arrest warrants; c) entries of person's own residences based on arrest warrants; and d) entries of residences, third party or otherwise, where officers have search warrants. We would be happy to explain our reasoning in greater detail to anyone who wishes to contact us to explore this subject area in greater detail.

On the first point, in our extensive research, we have seen no reported decision in this state or elsewhere, other than Anderson, that suggests that there are any limits on a court issuing a search warrant authorizing officers to enter a premises to make an arrest on a misdemeanor arrest warrant. We think that there are no such limits on search warrant issuance and execution where officers in fact have probable cause to believe that a person wanted on the misdemeanor arrest warrant will be on the premises when they execute the search warrant (either because the residence is that of the arrestee, or because, in contrast to the Anderson facts, there is individualized probable cause to believe that the person will be there).

We acknowledge that the second point involves a closer question. But the Anderson Court's "dicta" (i.e., discussion not necessary to support the decision) oversimplifies things when the Court says that "there must be strong justification for forcefully entering even the suspect's own residence in the case of a minor offense – here, a misdemeanor." The only misdemeanor warrant arrest case cited by Division Three on this point is a 1987 Division Three opinion that contained similar dicta. These are the only two Washington decisions ever to address the question of authority of officers to forcibly enter a person's own residence to arrest him on a misdemeanor arrest warrant (but without a search warrant). In our research of case law in other jurisdictions, we have found very few cases, but we believe the clear majority view is that there is not a need for special justification to justify forcible entry to arrest on a misdemeanor arrest warrant when officers have probable cause to believe the subject of the arrest warrant is at home. See, for example, U.S. v. Clayton, 210 F.3d 841

(8th Cir. 2000) and the cases cited at pages 843-44 (including a Ninth Circuit decision assuming, the point).

We hasten to add two things regarding our second point. First, Washington's Supreme Court held in State v. Ladson, 138 Wn.2d 343 (1999) September 1999 LED:05 that a pretextual traffic stop is unlawful. The Washington courts might extend Ladson to invalidate a pretextual entry of a person's residence, purportedly to execute a misdemeanor arrest warrant, where the officers' primary subjective intent is instead to investigate more serious crimes, not to execute the misdemeanor arrest warrant. Second, nothing we say in the LED about the base line of the constitutional limits on police authority suggests a position as to the wisdom of individual agency policies placing limits on police entries of private residences. It might well be wise for police agencies to impose greater limits on their officers in this delicate and thorny area of the law.

PRESENCE OF SOME OF DEFENDANT'S PERSONAL EFFECTS IN BEDROOM NOT ENOUGH TO ESTABLISH "CONSTRUCTIVE POSSESSION" OF A GUN FOUND THERE

State v. Alvarez, ___ Wn. App. ___, 19 P.3d 485 (Div. III, 2001)

Facts and proceedings in record below: (Excerpted from Court of Appeals opinion)

> Police served a warrant to search for evidence of drug activity at an apartment in Moses Lake. Mr. Alvarez and five other juveniles were brought into the front room and read their Miranda rights. Police attempted to identify those who did not live there and allowed them to leave. They did not release Mr. Alvarez.
>
> Police found a fully loaded .38 caliber revolver in a back bedroom closet. Photographs of Mr. Alvarez were taped to the wall of the closet. Some of his clothes were in the room. Some savings account deposit books in Mr. Alvarez's name were in a shoebox by the bed. Mr. Alvarez was charged with second degree unlawful possession of a firearm, based on constructive possession as the occupant of the bedroom.
>
> *Evidence of Occupancy*. [An officer] found newspaper articles and photographs. Three books of savings account deposits in Mr. Alvarez's name were in a shoebox next to the mattress. Mr. Alvarez's book bag was on the floor just inside the bedroom door. No rental documents, bills, or other mail were found. No fingerprints were taken. Mr. Alvarez had been present when the police visited the apartment two days prior to the warrant search. He was brought from a room down the hall where he was sleeping.
>
> Mr. Alvarez denied the room was his. Phillip Jacobsen testified that only he and Aaron Pugh live there. Mr. Alvarez's girl friend and his grandmother testified that Mr. Alvarez lived with his grandparents.
>
> The judge found that the room containing the gun was Mr. Alvarez's room. He found Mr. Alvarez guilty of unlawful possession of the gun.

Facts not in record below: According to a report by one of the officers, just after the occupants of the premises were group-Mirandized, Alvarez uttered a brief statement that tended to indicate he lived in the premises. Before trial, Alvarez moved unsuccessfully to suppress the statement under Miranda. But, for reasons not explained in the Alvarez decision, Alvarez's statement was not placed in evidence in the adjudication stage of the case, nor was the statement made a part of the trial court findings, and hence the statement could not be considered on appeal as evidence supporting the State's constructive possession theory.

ISSUE AND RULING: For "constructive possession" purposes, was there sufficient evidence of Alvarez's occupancy of the bedroom where the gun was found? (ANSWER: No)

Result: Reversal of Grant County Superior Court juvenile adjudication against Anthony D. Alvarez for unlawful possession of a firearm by a juvenile.

ANALYSIS: (Excerpted from Court of Appeals opinion)

> *Constructive Possession*. It is a felony for a person under the age of 18 to possess or control a firearm, with certain non-germane exceptions. RCW 9.41.040(1)(b)(iii), (2)(b). Possession may be actual or constructive. Constructive possession can be established by showing the defendant had dominion and control either over the firearm itself or over the premises where the firearm was found. State v. Echeverria, 85 Wn. App. 777 (Div. III, 1997).
>
> *Dominion and Control over the Premises*. In establishing dominion and control over the premises, the totality of the circumstances must be considered. No single factor is dispositive.
>
> Constructive possession of an apartment is usually established by showing the defendant leased the apartment or paid rent and resided there. Short of that, letters and bills addressed to the defendant at that address and the defendant's flight to the room in which the contraband was found when the police arrived may be enough. State v. Walton, 64 Wn. App. 410 (1992). Payment of rent or possession of keys will do. State v. Partin, 88 Wn.2d 899 (1977). Other factors deemed significant have been phone callers asking for the defendant at the address and the absence of any evidence the defendant had another address.
>
> Evidence of temporary residence or the mere presence of personal possessions on the premises is, however, not enough. In Partin, a finding of occupancy was based on photographs and articles featuring the defendant, a payment book for the purchase of the premises with Mr. Partin's paycheck stubs inside, three letters addressed to him, and his unemployment documents. Mr. Partin gave out the address as his own and had acted as if he owned the place on a previous police visit. The phone rang repeatedly with callers asking for Mr. Partin.
>
> In State v. Callahan [77 Wn.2d 27 (1969)], two books, two guns and a broken scale belonging to the defendant, plus evidence the defendant had been staying on the premises for two or three days was not enough. Even evidence that a person received some mail at a residence and lived there off and on was not sufficient to show constructive possession. State v. Hagen, 55 Wn. App. 494 (1989). Some evidence of participation in paying rent is generally required. State v. Callahan. "The single fact that he had personal possessions, not of the clothing or personal toilet article type, on the premises is insufficient" to support a conclusion of dominion and control. A selection of minimal sufficient evidence is collected in Walton: receipts, utility and telephone bills addressed to the defendant; the presence of his small children; a business card with his name and the address of the premises.
>
> Here, the [trial] court did not make a definitive finding that any person had dominion and control over the room. Only that, if anyone did, Mr. Alvarez was the most likely candidate. The only items arguably belonging to Mr. Alvarez were savings account deposit books, some books, and pictures and newspaper articles featuring him or people he was connected with. There was some evidence he resided elsewhere.
>
> We accept the court's findings of fact as verities and give them the benefit of all favorable inferences. And doing so, the findings here are insufficient to conclude that Mr. Alvarez exercised dominion and control over the premises.

[Some citations omitted]

CONDITIONAL "GUN LOCKER TIME" STATEMENT TO COUNSELOR HELD ADMISSIBLE AND SUFFICIENT TO SUPPORT CONVICTION FOR "INTIMIDATING A JUDGE"

State v. Side, ___ Wn. App. ___, 21 P.3d 321 (Div. III, 2001)

Facts and proceedings below: (Excerpted from Court of Appeals opinion)

> Ken Side appeared before Judge Philip Borst following a dispute with his neighbor. Judge Borst held Mr. Side in contempt and ordered him jailed for 30 days. Judge Borst later met with Mr. Side and gave him the option to complete an anger management class in lieu of jail time. Mr. Side agreed.
>
> Nazal Fausel screened Mr. Side at the Lincoln County Counseling Center. [*Later in the opinion, the Court notes that Ms. Fausel warned Mr. Side that any threats would be reported.* **LED** Ed**.**] Kimberly Waples conducted his "intake" interview. Mr. Side told Ms. Waples that people, including Judge Borst, had "better not mess with" him or it would be "gun locker time." He said "gun locker time" meant he would "have to take people out." When Ms. Waples asked what he thought violence would accomplish, Mr. Side stated "[t]here would be one less judge in the world to be making decisions like this." Ms. Waples reported the comments to her superiors. Robert Shepard saw Mr. Side next.
>
> The State charged Mr. Side with intimidating a judge based on his comments to Ms. Waples. He moved to suppress statements from the Counseling Center counselors. The court denied the motion.
>
> The jury convicted Mr. Side as charged.

ISSUE AND RULING: 1) Are defendant's "gun locker" statements to the counselor sufficient to support his conviction for "intimidating a judge"? (ANSWER: Yes); 2) Are defendant's statements to the counselor confidential under RCW 71.05.390, and therefore inadmissible in evidence? (ANSWER: No, the statute does not require exclusion of statements, and, in any event, defendant was told before the counseling session that threats he made would be repeated).

Result: Affirmance of Lincoln County Superior Court conviction of Ken Side for intimidating a judge.

ANALYSIS: (Excerpted from Court of Appeals opinion)

1) Sufficiency of evidence

> Mr. Side contends his statements were not true threats because (1) he would not have made them outside the Counseling Center, (2) his statements were couched in conditional terms, and (3) he did not believe his statements would be heard by anyone other than Ms. Waples.
>
> Mr. Side's challenge to the sufficiency of the evidence admits the truth of the State's evidence and all reasonable inferences therefrom. We review the evidence in the light most favorable to the State to determine if a rational trier of fact could have found all of the elements of the crime beyond a reasonable doubt.
>
> Intimidation of a judge requires: (1) a direct or indirect threat; (2) to a judge; and (3) because of a ruling or decision by that judge in any official proceeding. State v. Hansen, 122 Wn.2d 712 (1993) **Feb 94 LED:19**. The threat need not reach the judge. Nor need the defendant actually intend to cause the bodily harm. State v. Kepiro, 61 Wn. App. 116 (1991) **Nov 91 LED:19**. "All that is required is that the defendant direct a threat to a judge in which he [or she] communicates the intent to do so."
>
> "`Threat' means to communicate, directly or indirectly the intent: (a) To cause bodily injury in the future to the person threatened . . . ." RCW 9A.04.110(25)(a) The intimidating-a-judge statute expressly incorporates this definition of a threat. RCW 9A.72.160(2)(b).
>
> Here, Mr. Side was at the Counseling Center precisely because Judge Borst held him in contempt. He said Judge Borst had "better not mess with" him or it would be "gun locker time." And Mr. Side said "gun locker time" meant he would "have to take people out." When

asked what he thought violence would accomplish, Mr. Side stated "[t]here would be one less judge in the world to be making decisions like this." These are threats to a judge because of a ruling. And they satisfy the three necessary elements.

Mr. Side contends that his statements to the counselors were confidential under RCW 71.05.390 because they were made as part of his counseling. He argues the court erred by allowing Ms. Waples to testify concerning threatening statements made in confidence.

RCW 71.05.390 does not apply here for two reasons. First, the confidentiality requirements of RCW 71.05.390 do not create a testimonial privilege.

2) Confidentiality and exclusion

Even if RCW 71.05.390 applied, Mr. Side's statements fall within an exception:

> Information and records may be disclosed only:
>
> > …(10) To appropriate law enforcement agencies and to a person, when the identity of the person is known to the public or private agency, whose health and safety has been threatened. . . .

RCW 71.05.390(10). Mr. Side's threat to "take out" Judge Borst is certainly a threat to Judge Borst's health and safety. RCW 71.05.390(10).

Finally, Mr. Side's expectation of confidentiality is unreasonable. Ms. Fausel warned Mr. Side that any threats he made would be reported. Mr. Side admitted as much. A patient who is warned that communications may not be kept confidential has no reasonable expectation of confidentiality and any privilege is waived.

[Some citations omitted]

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BRIEF NOTE FROM THE WASHINGTON STATE COURT OF APPEALS

DETECTIVE LAWFULLY TRICKS DEFENDANT INTO E-MAIL, ICQ EXCHANGE WITH FICTITIOUS CHILD: RCW 9.73 CHALLENGE REJECTED AND ATTEMPTED RAPE-OF-CHILD CONVICTION UPHELD -- In State v. Townsend, ___ Wn. App. ___, 20 P.3d 1027 (Div. III, 2001), the Court of Appeals upholds defendant's conviction for attempted second degree rape of a child. The Court rejects defendant's contentions: a) that the trial court erred in admitting evidence of e-mail and client-to-client communications between himself and a fictitious 13-year-old; and b) that he should not have been convicted of attempted second degree rape of a child because of impossibility and actions were mere preparation, not a "substantial step."

The Townsend Court describes the facts of the case as follows:

> Based on tips from two citizen informants, Spokane Police Detective Jerry Keller suspected that Mr. Townsend was attempting to set up sexual liaisons with minor girls on the computer. To investigate the matter, the detective created a fictitious 13-year-old girl named "Amber." He established a Hotmail Internet e-mail account for "Amber." He also created an account for "Amber" on ICQ, an Internet discussion software program that allows real-time client-to-client communications.
>
> Beginning in May 1999, "Amber" had several e-mail and ICQ discussions with Mr. Townsend. These communications were saved automatically on Detective Keller's computer, so he was able to store and print them for use as evidence in this case. The e-mail messages pertained to having a face-to-face meeting. The ICQ communications

contained very graphic discussions about sex. Mr. Townsend explained to "Amber" how one gets pregnant and how they could avoid getting her pregnant. The details of what he intended to do with "Amber" when they met became increasingly graphic and described sexual intercourse and oral sex. "Amber" eventually told Mr. Townsend she would meet him in a room at a Spokane motel on June 4, 1999. The night before the planned meeting, Mr. Townsend stated in an ICQ message that he wanted to have sex with her the next day. The last ICQ communication was on June 4, 1999, and lasted from 4:57 p.m. to 5:20 p.m. During this communication, Mr. Townsend indicated that he still wanted to have sex with "Amber."

About an hour later, Mr. Townsend knocked on the motel room door, identified himself as Donald, and said he was looking for "Amber." After Detective Keller arrested him, Mr. Townsend admitted he left his apartment to come to the motel to have sex with "Amber," who he believed to be 13 years old, but he had changed his mind. Mr. Townsend admitted sending the ICQ message on June 3, in which he said he wanted to have sex with "Amber" the next day.

1) Chapter 9.73 RCW (Implied Consent)

The Privacy Act, chapter 9.73 RCW, prohibits the interception or recording of private communication by certain devices. The Townsend Court rules that the recording of e-mail and ICQ communications is covered by RCW 9.73, but that defendant impliedly consented to the recording of the messages that he sent to the fictitious child (the detective). The Townsend Court relies in part on a prior decision in a civil case holding that a person leaving a phone message on voicemail impliedly consents to the recording. See Farr v. Martin, 87 Wn. App 177 (Div. I, 1997) **April 98 LED:11**.

2) Substantial step toward rape attempt (Impossibility? Mere preparation?)

The Townsend Court rejects defendant's "impossibility" and "mere preparation" arguments under the following analysis:

A person is guilty of an attempt if, with intent to commit a specific crime, he or she "does any act which is a substantial step toward the commission of that crime." RCW 9A.28.020(1). Mr. Townsend contends he did not and could not have taken a substantial step toward committing second degree child rape. A person commits second degree rape of a child if he or she "has sexual intercourse with another who is at least twelve years old but less than fourteen years old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim." RCW 9A.44.076(1). Thus, to convict Mr. Townsend of attempted second degree child rape, the State was required to prove he took a substantial step toward having sexual intercourse with "Amber."

Mr. Townsend argues in part that he could not have taken such a substantial step because "Amber" was not real. But RCW 9A.28.020(2) expressly provides that factual impossibility is not a defense to a crime of attempt. Under this provision, for example, a person may attempt to possess stolen property even if the property he attempts to possess is not actually stolen. The attempt statute focuses "on the criminal intent of the actor, rather than the impossibility of convicting him of a completed crime." It thus makes no difference that Mr. Townsend could not have completed the crime because "Amber" did not exist. He is guilty of the attempt if he intended to have sexual intercourse with her.

Mr. Townsend also contends the evidence was insufficient to show that he took a substantial step toward committing second degree child rape.

Mere preparation to commit a crime is not an attempt. A person's "conduct is not a substantial step `unless it is strongly corroborative of the actor's criminal purpose.'" Conduct

that may constitute a substantial step includes "`enticing or seeking to entice the contemplated victim of the crime to go to the place contemplated for its commission.'"

The evidence shows that Mr. Townsend sought to entice "Amber" to meet with him at the motel room to engage in sexual intercourse. This alone would support the conviction, but Mr. Townsend went even further: He appeared at the door where the crime was to have occurred. A reasonable inference is that in going there he intended to engage in sexual intercourse with "Amber." From this evidence, a rational factfinder could have found that Mr. Townsend took a substantial step toward committing the crime of second degree child rape.

[Citations omitted]

Result: Affirmance of Spokane County Superior Court conviction of Donald Theodore Townsend.

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NEXT MONTH

The July 2001 LED will include: (1) **Part 1 of our 2001 Washington Legislative Update** (note: most legislation that passed during the 2001 regular session takes effect July 22, 2001); (2) an entry on the U.S. Supreme Court's April 24, 2001 decision in **Atwater v. City of Lago Vista**, 2001 WL 408925 (a 5-4 decision holding, as to Fourth Amendment custodial arrest authority for misdemeanors, that it is not necessary that the misdemeanor be punishable by jail time, and it is not necessary that the offense involve a breach of the peace (note: it appears that the Atwater decision does not provide a basis for a change in advice or training for state and local officers in Washington); and (3) if space allows, an entry on the April 17, 2001 decision of Division Three of the Washington Court of Appeals in **State v. Bessette** (2001 WL 378952), where the Court of Appeals ruled that, where an officer chased an MIP offender in "hot pursuit" to a third party's residence, the officer did not have constitutional authority to make a forcible, warrantless entry of the third party's residence in order to arrest the fleeing offender.

Note that the text of all of the legislation, chapter by chapter, adopted during the 2001 Washington regular session and signed into law by the Governor should be accessible by late May on the internet at [http://www.leg.wa.gov/pub/billinfo/2001-02/chapter_to_bill_table.htm].

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INTERNET ACCESS TO COURT DECISIONS, STATUTES, AND WAC RULES

The Washington office of the Administrator for the Courts maintains a web site with appellate court information, including recent court opinions by the Court of Appeals and State Supreme Court. The address is [http:www.courts.wa.gov/]. Decisions issued in the preceding 90 days may be accessed by entering search terms, and decisions issued in the preceding 14 days may be more simply accessed through a separate link clearly designated.

Many United States Supreme Court opinions can be accessed at [http://supct.law.cornell.edu/supct]. This web site contains all U.S. Supreme Court opinions issued since 1990 and many significant opinions of the Court issued before 1990.

Easy access to relatively current Washington state agency administrative rules (including WSP equipment rules at Title 204 WAC and State Toxicologist rules at WAC 448-15), as well as all RCW's current through January 2001, can be found at [http://slc.leg.wa.gov/]. Information about bills filed in the 2001 Washington Legislature may be accessed at the following address: [http://www.leg.wa.gov] -- look under "bill info," "house bill information/senate bill information," and use bill numbers to access information. In addition, a wide range of state government information can be accessed at [http://access.wa.gov]. The address for the Criminal Justice Training Commission's webpage is [http://www.wa.cjt], while the address for the Attorney General's Office webpage is [http://www/wa/ago].

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The Law Enforcement Digest is co-edited by Senior Counsel John Wasberg and Assistant Attorney General Shannon Inglis, both of the Washington Attorney General's Office. Questions and comments regarding the content of the **LED** should be directed to Mr. Wasberg at 206 464-6039; Fax 206 587-4290; E Mail [johnw1@atg.wa.gov]. Questions regarding the distribution list or delivery of the **LED** should be directed to Kim McBride of the Criminal Justice Training Commission (CJTC) at (206) 835-7372; Fax (206) 439-3752; e mail [kmcbride@cjtc.state.wa.us]. **LED** editorial comment and analysis of statutes and court decisions expresses the thinking of the writers and does not necessarily reflect the views of the Office of the Attorney General or the CJTC. The **LED** is published as a research source only. The **LED** does not purport to furnish legal advice. **LED**'s from January 1992 forward are available via a link on the Commission's Internet Home Page at: [http://www.wa.gov/cjt].